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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
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11 LAURA LEIGH,) 3:11-cv-00608-HDM-WGC
12)
13 Plaintiff,)
14 vs.) ORDER
15)
16 SALLY JEWELL, et al.,)
17)
18 Defendants.)
19 _____)

20 Before the court is the defendants' second motion to dismiss,
21 or in the alternative motion for judgment on the pleadings (#84).
22 Defendants argue that the court lacks subject matter jurisdiction
23 over plaintiff's claims in this action. Plaintiff has opposed
24 defendants' motion (#93), and defendants have replied (#101).
25 Following the court's order granting plaintiff leave to file a
26 "fourth amended complaint," the court construed the outstanding
27 motion to dismiss as a motion to dismiss the fourth amended
28 complaint and granted the parties leave to file supplemental
briefs. On September 19, 2013, defendants filed their supplemental
brief (#106). Plaintiff has responded (#107), and defendants have
replied (#114).

1 Once the pleadings have closed – “but early enough not to
2 delay trial – a party may move for judgment on the pleadings.”
3 Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings
4 based on a lack of subject matter jurisdiction is analyzed under
5 the same standard applied to motions to dismiss under Federal Rule
6 of Civil Procedure 12(b)(1). *Or. Wild v. Connor*, 2012 WL 3756327,
7 at *1 (D. Or. 2012); 5C Charles A. Wright & Arthur R. Miller,
8 Federal Practice and Procedure, § 1367, at 221 (3d ed. 2004).
9 Under Rule 12(b)(1), the plaintiff bears the burden of establishing
10 subject matter jurisdiction. *Hexom v. Or. Dep’t of Transp.*, 177
11 F.3d 1134, 1135 (9th Cir. 1999). In determining whether the court
12 has subject matter jurisdiction, the court may consider evidence
13 outside of the complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d
14 1035, 1039 (9th Cir. 2004).

15 Plaintiff’s complaint asserts that defendants have violated
16 the Wild Free-Roaming Horse and Burros Act (“Wild Horse Act”), 16
17 U.S.C. §§ 1331 *et seq.*, accompanying regulations, and their own
18 internal policies, by conducting roundups of excess wild horses in
19 an inhumane manner. Under the Wild Horse Act, the Secretary of the
20 Interior is tasked with protecting and managing the wild horses on
21 the lands it controls. *Id.* §§ 1332(a), (e), 1333(a). As designate
22 for the Secretary, the Bureau of Land Management (“BLM”) has a
23 “great deal of discretion” in carrying out those duties. *Am. Horse*
24 *Prot. Ass’n, Inc. v. Frizzell*, 403 F. Supp. 1206, 1217 (D. Nev.
25 1975) (citing legislative history). The Act requires BLM to round
26 up and remove from the range “excess” wild horses, as defined by
27 the statute, and requires that all such roundup activities be
28 conducted “humanely.” 16 U.S.C. § 1333(b)(2)(B) (requiring that

1 horses be "humanely captured and removed" and provided "humane
2 treatment and care (including proper transportation, feeding, and
3 handling)"); see also 16 U.S.C. § 1338a (providing that helicopter
4 use be "in accordance with humane procedures prescribed by the
5 Secretary"); 43 C.F.R. § 4740.1 (providing that helicopter use be
6 "conducted in a humane manner").

7 Judicial review of plaintiff's claims is governed by the
8 Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*
9 Under the APA, the court must hold unlawful and set aside agency
10 "action, findings and conclusions" that are "arbitrary, capricious,
11 an abuse of discretion, or otherwise not in accordance with law" or
12 "without observance of procedure required by law," *id.* §
13 706(2)(A), (D), and "compel agency action unlawfully withheld or
14 unreasonably delayed," *id.* § 706(1). Agency action that is subject
15 to review under the APA includes "[a]gency action made reviewable
16 by statute and final agency action for which there is no other
17 adequate remedy in a court." 5 U.S.C. § 704.

18 Plaintiff does not argue that the actions she challenges are
19 reviewable by statute. The question is therefore whether she
20 challenges final agency action. If she has not challenged final
21 agency action, the court lacks subject matter jurisdiction to
22 consider her claims. See *San Luis Unit Food Producers v. United*
23 *States*, 709 F.3d 798, 801 (9th Cir. 2013).

24 "Agency action is defined to include the whole or a part of an
25 agency rule, order, license, sanction, relief, or the equivalent or
26 denial thereof, or failure to act." *Norton v. S. Utah Wilderness*
27 *Alliance*, 542 U.S. 55, 62 (2004) (quoting 5 U.S.C. § 551(13))
28 (hereinafter cited and referred to as *SUWA*). An agency's failure

1 to act may be challenged only where it has failed to take a
2 discrete action it is required by law to take. *Id.* at 62-63. "For
3 an agency action to be final, the action must (1) mark the
4 consummation of the agency's decisionmaking process and (2) be one
5 by which rights or obligations have been determined, or from which
6 legal consequences will flow." *Or. Natural Desert Ass'n v. U.S.*
7 *Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (quoting *Bennett v.*
8 *Spear*, 520 U.S. 154, 178 (1997)) (internal quotation marks
9 omitted). "The core question is whether the agency has completed
10 its decisionmaking process, and whether the result of that process
11 is one that will directly affect the parties." *Id.* (quoting *Indus.*
12 *Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638,
13 646 (9th Cir. 2005)).

14 To decide whether plaintiff's complaint challenges final
15 agency action subject to review under the APA, the court must first
16 clarify what claims the complaint contains, and what claims it does
17 not.¹

18 The gravamen of plaintiff's fourth amended complaint is that
19 the wild horse gathers in the Triple B Complex and the Jackson
20 Mountain Herd Management Area have been conducted inhumanely.
21 Specifically, plaintiff alleges that defendants have failed to
22 correct the inhumane actions of its contractor by enforcing the
23 legal and contractual requirements in place to ensure that horses
24 are humanely gathered. With respect to Triple B, plaintiff argues
25 that horses have been treated inhumanely because the contractor
26 has: (1) flown helicopters too close to the horses and run foals

27
28 ¹ The operative complaint in this action is plaintiff's "fourth amended
complaint," filed on October 14, 2013 (#113).

1 for too long; (2) failed to ensure the horses had adequate feed and
2 water in temporary holding; (3) failed to control dust from the
3 rotor wash; and (4) temporarily held unweaned foals away from their
4 mothers for up to ten hours. With respect to Jackson Mountain,
5 plaintiff argues that horses have been treated inhumanely by (1)
6 the use of helicopters during the foaling season; and (2) the use
7 of bait and water trapping.

8 Plaintiff's bait and water trapping claim was added to the
9 complaint pursuant to the leave granted by the court to include
10 "any additional factual allegations related to inhumane conduct at
11 any roundups conducted pursuant to the Jackson Mountain and
12 Triple B EAs, including bait-trapping at Jackson Mountain." (Doc.
13 #105 (Order Dated July 23, 2013)). The court did not grant
14 plaintiff leave to amend her complaint to include a claim relating
15 to bait and water trapping in Jackson Mountain.

16 Plaintiff's fourth amended complaint contains additional
17 allegations and claims that were not authorized by the court's
18 order granting her leave to amend. Specifically, it contains
19 assertions regarding the limited observation of the wild horses
20 during roundups and defendants' failure to "disclose the
21 disposition of animals during the removal and post removal
22 process," as well as conclusory assertions that defendants may not
23 be following a mandated order of preference in conducting the
24 roundups. (Pl. Fourth Am. Compl. 4).

25 Finally, in her opposition, plaintiff also asserts that her
26 complaint contains a claim that the defendants failed to consider
27 humane gather alternatives when authorizing the roundups. However,
28 even a generous reading of her complaint does not suggest such a

1 claim. Moreover, plaintiff was not granted to leave to include any
2 such claim in her complaint. At this late date, and given
3 plaintiff's several opportunities to amend her complaint, the
4 plaintiff will not be granted leave to file a claim relating to the
5 defendants' alleged failures to consider humane gather
6 alternatives.

7 Therefore, plaintiff's complaint challenges the actions and/or
8 failures to act of defendants with respect to their contractor(s)'
9 conduct during the wild horse roundups in Triple B and Jackson
10 Mountain. Plaintiff brings her claim pursuant to § 706(2) - under
11 which the court must set aside unlawful agency action. However,
12 she frames her claim as a *failure to act*, which is cognizable under
13 § 706(1) - compelling agency action unlawfully withheld. Given the
14 lack of clarity of plaintiff's position, the court will analyze her
15 claim under both sections.

16 A. Affirmative Action - § 706(2)

17 To be subject to review under § 706(2), defendants' actions
18 must be "final agency action." The question here is whether the
19 conduct of the gathers is agency action that marks the
20 "consummation" of the decisionmaking process and is one from which
21 legal rights or obligations have been determined or from which
22 legal consequences will flow. Two Ninth Circuit address this
23 issue.

24 In *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9th Cir.
25 2013), the plaintiffs challenged the Fish and Wildlife Service's
26 actions in closing gates at a dam, which diverted water and
27 obstructed fish passage through certain waterways. The Ninth
28 Circuit held that the closing of the gates was not challengeable

1 final agency action for two reasons. First, the court held that it
2 was not "a discrete agency action that fits within the APA's
3 definition of that term." *Id.* at 801. The court noted that while
4 the "act of closing the gates . . . has immediate physical
5 consequences, such action is not fairly analogous to a 'rule,
6 order, license, sanction, [or] relief.'" *Id.* Second, the court
7 held the "individual acts of closing gates . . . do not 'mark the
8 consummation of the agency's decisionmaking process . . . because
9 they constitute day-to-day operations that merely implement
10 operational plans.'" *Id.* The court noted that "the APA's
11 requirement of final agency action precludes [the court from]
12 undertaking a general judicial review of [an agency's] day-to-day
13 operations." *Id.* at 802 (citing *Mont. Wilderness Ass'n, Inc. v.*
14 *U.S. Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003), *vacated on other*
15 *grounds*, 542 U.S. 917 (2004) (holding that the agency's 'routine
16 maintenance work' on federal lands is not final agency action
17 because these activities 'implement [the agency's] travel
18 management and forest plans' for the lands at issue)).

19 In *Oregon Natural Desert Association v. U.S. Forest Service*,
20 465 F.3d 977 (9th Cir. 2006), the Forest Service argued that annual
21 operating instructions ("AOIs") issued to permittees who grazed
22 livestock on national forest land were not final agency action
23 because the AOIs merely implemented decisions set forth in longer
24 term management plans. *Id.* at 979-82. The Ninth Circuit disagreed.
25 It held that the AOIs, which were made part of the grazing permits
26 and governed the permit holder's operations for the following year,
27 were "licenses" and therefore "agency action." *Id.* at 980, 983.
28 It further held that rather than merely implementing decisions the

1 Forest Service had already made, the AOIs were also "final" because
2 in imposing the terms and conditions that would govern permittees
3 for the following year, the AOIs marked the consummation of the
4 Forest Service's annual decisionmaking process and were actions "by
5 which rights or obligations" were determined "or from which legal
6 consequences" would flow. *Id.* at 984-89.

7 Here, the consummation of the decisionmaking process was the
8 decision to conduct a roundup, embodied in the Environmental
9 Assessment ("EA"). The actions taken during the roundup merely
10 implement the EA. No further decisions, such as the setting of
11 rights and obligations that were evident in *Oregon Natural Desert*
12 *Association*, were made following the EA, nor were any actions taken
13 that fit within the definition of agency action in 5 U.S.C. § 551.
14 Because the conduct of the wild horse gathers is not final agency
15 action, the court lacks subject matter jurisdiction to consider
16 plaintiff's claim under § 706(2). *See San Luis Unit Food Producers*
17 *v. United States*, 709 F.3d 798, 801 (9th Cir. 2013).

18 B. Failure to Act - § 706(1)

19 Plaintiff also frames her claim as a failure to act. (See Pl.
20 Fourth Am. Compl. 19) (asserting that defendants have violated
21 their legal duties by failing "to enforce the *humane* laws of the
22 United States" - laws, policies, and regulations - to correct,
23 modify, or stop the contractors' inhumane actions)). Although she
24 insists that a failure to act claim may be properly asserted under
25 § 706(2), regardless of the merit of that claim, a failure to act
26 claim would be cognizable under § 706(2) only where the failure to
27 act effectively resulted in "final agency action." *See Franco v.*
28 *U.S. Dep't of the Interior*, 2012 WL 3070269 (E.D. Cal. 2012). *Cf.*

1 *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th
2 Cir. 1999) ("This court has refused to allow plaintiffs to evade
3 the finality requirement with complaints about the sufficiency of
4 an agency action 'dressed up as an agency's failure to act.'").
5 While the defendants' failure to act may have impacted the conduct
6 of the wild horse roundups, the conduct of the wild horse roundups
7 is not "final agency action." Therefore, plaintiff's claim is no
8 more cognizable under § 706(2) when framed as a failure to act.

9 Regardless, the Supreme Court has suggested that a failure to
10 act claim should be brought under § 706(1). *SUWA*, 542 U.S. at 63
11 ("The APA provides relief for a failure to act in § 706(1)"). Under
12 § 706(1), an agency's failure to act may be reviewed under the APA
13 only where the agency has failed to take a discrete action it is
14 required by law to take. *SUWA*, 542 U.S. at 62-63.

15 In *SUWA*, the plaintiffs alleged that the BLM had failed to
16 prevent degradation of wilderness study areas by managing off-road
17 vehicle use and that this violated its duty under statute to manage
18 such areas "in a manner so as not to impair the suitability of such
19 areas for preservation as wilderness." 542 U.S. at 59. While the
20 Court held that the statute was mandatory, it also held that
21 because the duty to not impair was a broad mandate that allowed the
22 agency discretion in how to achieve it, it was not sufficiently
23 specific, or discrete, to be enforceable under the APA. The Court
24 further stated that the limitation of challenges to "discrete"
25 actions is done "to protect agencies from undue judicial
26 interference with their lawful discretion, and to avoid judicial
27 entanglement in abstract policy disagreements which courts lack
28 both expertise and information to resolve." *Id.* at 66. The court

1 went on to state:

2 If courts were empowered to enter general orders
3 compelling compliance with broad statutory mandates, they
4 would necessarily be empowered, as well, to determine
5 whether compliance was achieved—which would mean that it
6 would ultimately become the task of the supervising
7 court, rather than the agency, to work out compliance
8 with the broad statutory mandate, injecting the judge
9 into day-to-day agency management.

10 *Id.* at 66-67.

11 Here, plaintiff alleges that defendants failed to ensure that
12 the roundups were conducted “humanely” in accordance with 16 U.S.C.
13 § 1333, 16 U.S.C. § 1338a, 47 C.F.R. § 4700.0-5, and 47 C.F.R. §
14 4740.1. “Humane” is defined under the statute as “handling
15 compatible with animal husbandry practices accepted in the
16 veterinary community, without causing unnecessary stress or
17 suffering to a wild horse or burro.” 43 C.F.R. § 4700.0-5(e).
18 “Inhumane treatment means any intentional or negligent action or
19 failure to act that causes stress, injury, or undue suffering to a
20 wild horse or burro and is not compatible with animal husbandry
21 practices accepted in the veterinary community.” *Id.* § 4700.0-
22 5(f).

23 The court concludes that the words “humane” and “inhumane,” as
24 defined and used in the statute and regulations imposes a broad
25 rather than discrete mandate. As such, it affords BLM discretion
26 in conducting the wild horse roundups. The definition is not
27 sufficiently specific that it could be enforced by the courts
28 without interference in defendants’ day-to-day operations.
Accordingly, plaintiff’s claim that defendants have failed to
ensure the gathers are conducted “humanely” is not final agency
action that may be challenged under the APA. Insofar as her claim

1 is based on the failure to ensure "humane" gathers, the court lacks
2 subject matter jurisdiction and plaintiff's claims must be
3 dismissed.

4 To the extent plaintiff may have alleged that defendants'
5 failure to regulate the use of helicopters in accordance with 16
6 U.S.C. § 1338a may be challenged under the APA, plaintiff has
7 failed to provide any regulations or other "humane procedures
8 prescribed by the Secretary" that are sufficiently specific to be
9 enforceable in this court.

10 Finally, with respect to plaintiff's claim that defendants
11 have failed to enforce the provisions of their contract with their
12 contractor, incorporated into the EA as appendix II, certain of
13 these provisions are substantially more specific - and thus
14 discrete - than the broad statutory mandates and regulations
15 discussed above. However, an agency may be required to follow (and
16 enforce) its own internal policies and rules only where there is
17 some indication that the agency intended to be bound by the policy
18 or rule.

19 "To be judicially enforceable, a pronouncement must prescribe
20 substantive rules - not interpretive rules, general statements of
21 policy or rules of agency organization, procedure or practice, and
22 must have been promulgated pursuant to a specific statutory grant
23 of authority and in conformance with the procedural requirements
24 imposed by Congress." *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th
25 Cir. 2003). Agency guidance manuals are generally unenforceable.
26 See *Lowry*, 329 F.3d at 1022; see also *Or. Natural Res. Council v.*
27 *Devlin*, 776 F. Supp. 1440, 1447 (D. Or. 1991) ("Manual provisions
28 and internal agency guidelines for implementing statutes are

1 generally not binding on agencies."). However, the Supreme Court
2 has not ruled out that a less formal agency plan may "itself create
3 a commitment binding on the agency," if there is "clear indication
4 of binding commitment in the terms of the plan." *SUWA*, 542 U.S. at
5 69.

6 Plaintiff has failed to establish that the contractual
7 provisions are substantive rules that were promulgated pursuant to
8 specific statutory authority and in conformance with procedural
9 requirements set by Congress. Accordingly, plaintiff has failed to
10 carry her burden of establishing subject matter jurisdiction with
11 respect to this aspect of her claim, as well.

12 In opposition to the defendants' motion, plaintiff raises a
13 number of arguments that the court finds to be without merit.

14 First, plaintiff argues that defendants' motion requests
15 relief already denied in conjunction with their earlier motion to
16 dismiss, at least with respect to Jackson Mountain. However, the
17 arguments raised in the instant motion to dismiss are entirely
18 different from those raised in the defendants' earlier motion to
19 dismiss. Moreover, as subject matter jurisdiction may be raised at
20 any time, defendants' motion is properly made.

21 Second, plaintiff argues that the defendants' motion is
22 untimely. However, a Rule 12(c) motion may be filed at any time as
23 long as it does not unduly delay proceedings. While defendants
24 filed their motion just a short time before this matter was to be
25 submitted for summary judgment, the filing was prompted by the
26 plaintiff's discovery requests, which defendants believe are
27 improper given the nature of this action. Accordingly, the motion
28 has not *unduly* delayed these proceedings.

1 Third, plaintiff makes several arguments as to why her
2 complaint states a claim sufficient to survive dismissal under
3 Federal Rule of Civil Procedure 12(b)(6). Defendants have not
4 moved to dismiss plaintiff's complaint under Rule 12(b)(6), so
5 these arguments are irrelevant.

6 Finally, plaintiff's opposition relies heavily on her proposed
7 third amended complaint, which the court has not allowed plaintiff
8 to file. Accordingly, all arguments made in reliance on the "third
9 amended complaint" are irrelevant.

10 In accordance with the foregoing, the defendants' motion for
11 judgment on the pleadings (#84) is hereby **GRANTED**. The clerk of
12 the court shall enter judgment accordingly.

13 IT IS SO ORDERED.

14 DATED: This 3rd day of January, 2014.

15 
16 UNITED STATES DISTRICT JUDGE
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